

# Bias of Arbitrators Revisited

*Dr. Kyriaki Noussia\**

E-mail: [k.noussia@exeter.ac.uk](mailto:k.noussia@exeter.ac.uk)

## Abstract

*International commercial arbitration lacks any universally recognized standard-setting body. Equally, no arbitral sets of worldwide etiquette rules nor any statutes and conventions containing any specific exist - other than general principles, i.e. that arbitrators must be free of bias, respect the limits of their authority and give each side an opportunity to present its case - and arbitral institutions leave arbitrators wide discretion in establishing facts and interpreting contracts. On the other hand, in order for a practice to qualify as biased or abusive, some contemplation of alternatives are required. However, most often, perceptions of abuse rest on cultural assumptions about the baselines and yardsticks that measure “normal procedure”.*

*This paper examines the issues and parameters entailed in the notions of impartiality and independence of arbitrators so as to denote the extent of the definition of their potential bias. It also critically assesses the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration and draws conclusions on the issue of bias of arbitrators in international commercial arbitration in the light of recent case law which is analysed as well as in the light of comparative analysis of the position in other jurisdictions (USA, France, Italy, Australia, Canada).*

## 1. INTRODUCTION

It is well accepted that to assure a just and fair judgment the members of an arbitral tribunal must be neutral and unbiased both between the parties and in the subject-matter of the dispute. The differences in the various existing statutes, rules and guidelines as to the impartiality and independence of international arbitrators have often been more a question of form than substance. The main objection to this is the ongoing dispute of whether to apply a

---

\* Senior Lecturer (E&R), University of Exeter, School of Law, CSSIS, E-mail: [k.noussia@exeter.ac.uk](mailto:k.noussia@exeter.ac.uk)

subjective or an objective standard for measuring impartiality and independence of international arbitrators. Both the 2004 and the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration constitute an attempt to balance two conflicting policy goals, i.e. a) permitting the parties sufficient autonomy to select the arbitrator of their choice and b) protecting the parties' right to have a full and timely disclosure in order to make their own judgments as to whether particular facts or circumstances give rise to reasonable doubts as to a proposed or sitting arbitrators' impartiality or independence.<sup>1</sup> In particular, the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration, which constitute a revised version of the original 2004 rules<sup>2</sup> have encouraged arbitrators directly and in response to demands of appointing authorities to disclose interests which may affect or be perceived to affect their impartiality or independence. Not least, these guidelines have also been of assistance to the court, as exemplified via reference to them in *Sierra Fishing Co v Farran*<sup>3</sup> but were not followed by the court in *W Ltd v M SDN BHD*<sup>4</sup> as our discussion below will show.

## 2. INDEPENDENCE AND IMPARTIALITY IN ARBITRATION.

The right to an impartial and independent judge also exists in arbitration and is crucial to the entire arbitration process.<sup>5</sup> Indeed, the mere fact that parties agree to settle their disputes by a private adjudicatory mechanism does not deprive them of the protections universally recognized as fundamental human rights. Because arbitration is a form of adjudication albeit a private one, it is important to secure, that the final outcome will be the result of an impartial process in which all sides have been fully heard. For parties to accept the outcome of an arbitration, even if it runs against them, they must be confident that those who sit in judgment do so fairly and with an open mind.<sup>6</sup> "Independence" means that an arbitrator must be free from any involvement or relationship with any of the parties. As a general principle, arbitrators should be independent from the lawyers representing the parties. "Impartiality" deals with the arbitrator's mental predisposition towards the parties or the subject matter or controversy at

---

<sup>1</sup> D. Lawson, *Impartiality and Independence of International Arbitrators*, 23 ASA Bulletin, 1/2005, 22-44

<sup>2</sup> A revised version of the original 2004 rules was adopted by resolution of the IBA Council in October 2014, and is published on <http://www.ibanet.org>

<sup>3</sup> *Sierra Fishing Co v. Farran* [2015] EWHC 140 at [58].

<sup>4</sup> *W Ltd v. M SDN BHD* [2016] EWHC 422 (Comm)

<sup>5</sup> R. Merkin, *Arbitration Law*, Informa, 2016, Ch. 10. 10.22.; D.S.J. Sutton, J. Gill, M. Gearing, *Russell on Arbitration*, 24th Ed, Sweet & Maxwell, 2015, Ch. 4 paras. 4-011, 4-022, 4-101 – 4-162.

<sup>6</sup> C. Koch, *Standards and Procedures for Disqualifying Arbitrators*, Journal of International Arbitration, 20(4), 325-353, 325.

hand. It is the interior frame of mind that the arbitrator brings to the reference. Impartiality is therefore referred to as a “subjective” standard.<sup>7</sup>

There was no specific statement to this effect in arbitration legislation prior to the AA 1996, although the Arbitration Act 1950 did contain various provisions to secure impartiality. The AA 1996 Act reproduces those provisions in a slightly different form, but also makes general statements on the question.<sup>8</sup> The English Arbitration Act 1996 (AA 1996) (Ch. 23 § 24) allows parties to petition the court to remove an arbitrator “if circumstances exist that give rise to justifiable doubts as to his impartiality”. The English courts apply two tests to ascertain impartiality. The first is known as the “actual bias” test. Actual bias is hard to prove and practically never invoked. The second is an “apparent bias” test based on facts and circumstances which would indicate that there might be ground for bias.<sup>9</sup> For example, the mere fact that a judge or arbitrator has a personal interest in the outcome of the case, suffices to disqualify the arbitrator. This test was formulated in the *Dimes v. Proprietors of the Grand Junction Canal*<sup>10</sup> case.

What is the difference between independence and impartiality? Independence is generally a function of prior or existing relationships that can be catalogued and verified, while impartiality is a state of mind. It has been said that independence is an “objective” standard, because it addresses the relationship between arbitrator and party, while impartiality is a “subjective” measure of a person’s inner attitude toward a party or a situation which can be seen from the outside only in the behaviour of the arbitrator. There may be objective grounds for disqualifying arbitrators which have nothing to do with their relationship or predisposition toward the parties or the dispute. This is the case when an arbitrator does not fulfil the contractually agreed and stipulated qualifications required by the arbitral agreement. The problem of independence and impartiality becomes acute when arbitrators from different backgrounds and with little or no international experience find themselves in an international commercial arbitration whereby the whole concept of independence and impartiality may be deeply coloured by their background. Again, no hard and fast rules exist. In the best of cases party appointed arbitrators are bridges to understanding. In the worst of cases they behave vociferously towards a party’s cause and, in doing so, lose credibility and standing within the

---

<sup>7</sup> *Ibid*, 318.

<sup>8</sup> R. Merkin, *Arbitration Law*, Informa, 2016, Ch. 10. 10.22-10.23; D.S.J. Sutton, J.Gill, M.Gearing, *Russel on Arbitration*, 24th Ed, Sweet & Maxwell, 2015, Ch. 4 paras. 4-011,4-022, 4-101 – 4-162.

<sup>9</sup> C. Koch, *Standards and Procedures for Disqualifying Arbitrators*, *Journal of International Arbitration*, 20(4), 325-353, 329.

<sup>10</sup> *Dimes v. Proprietors of the Grand Junction Canal* (1852) 3HL Cas. 759.

arbitral tribunal.<sup>11</sup> The consequences of the challenge towards an arbitrator are a) the suspension of the arbitral proceedings, b) the replacement of the arbitrator and the continuation of the procedure (or if the arbitral rules or tribunal decides so, the repetition of either a part or of all of the proceedings).<sup>12</sup>

In *ASM Shipping Ltd of India v. TTMI Ltd of England*<sup>13</sup> a witness for the applicants about to give evidence discovered that one of the arbitrators was a QC who had been involved in earlier proceedings in which an application had been made to the court by the QC for the disclosure of documents in the witness's possession. The witness gave evidence, and although the arbitrator was then asked to recuse himself he refused to do so. The applicants took no steps to have the arbitrator removed although they continued to protest to the respondents. An interim award was subsequently issued which was taken up by the applicants. The application which was subsequently made so as to have the arbitrator removed from further participation in the arbitration was rejected by Morison J. on the grounds of waiver. There had been no waiver simply by the witness giving evidence, as the timing of the events had not permitted otherwise, although the right to apply to the court had been waived by the applicants' failure to act, by means of an application to the court under s. 24 AA 1996, immediately the arbitrator had failed to recuse himself. By contrast, there was held to be no waiver in *Sierra Fishing Co v. Farran*<sup>14</sup> where the applicant in proceedings, to remove the arbitrator had applied to the arbitrator for the proceedings to be suspended, sought the appointment of a different tribunal, and tried to obtain information as to the date and place of the hearing. None of those acts was regarded by Popplewell J. as invoking the jurisdiction of the arbitrator.<sup>15</sup>

### 3. THE ISSUE OF THE CHALLENGE OF ARBITRATORS

Few anti-abuse mechanisms are more effective than an experienced and capable arbitral tribunal. Parties will also want to be clear about the procedural ground rules. In some cases, the threat of cost allocation can deter abuse. In extreme cases, frivolous motions and unfounded claims may even justify an order requiring the winner to bear the loser's legal fees. However, perhaps the best way to avoid court related abuse is by choosing the right arbitral *situs*. In this

---

<sup>11</sup> C. Koch, *Standards and Procedures for Disqualifying Arbitrators*, Journal of International Arbitration, 20(4), 325-353, 332-334.

<sup>12</sup> *Ibid*, 340.

<sup>13</sup> *ASM Shipping Ltd of India v. TTMI Ltd of England* [2005] EWHC 2238 (Comm).

<sup>14</sup> *Sierra Fishing Co v. Farran* [2015] EWHC 140 (Comm); [2015] 1 Lloyd's Rep 514.

<sup>15</sup> R. Merkin, *Arbitration Law*, Informa, 2016, Ch. 10; D.S.J. Sutton, J.Gill, M.Gearing, *Russell on Arbitration*, 24th Ed, Sweet & Maxwell, 2015, Ch. 4 paras. 4-011,4-022, 4-101 – 4-162.

context, the most appropriate model of judicial review is one in which courts exercise limited control over matters of basic procedural fairness while leaving the arbitrators a relatively free rein on the merits of controversy.<sup>16</sup>

Under English law, once a party becomes aware of grounds for doubting an arbitrator's impartiality there are a number of possible remedies available. First, the award itself may be challenged as having been obtained by reason of serious irregularity, under s.68(2)(a) AA 1996, on the basis that the arbitrator has failed to comply with the general duty under s.33 AA 1996 on how to conduct the arbitration impartially. As a consequence, the court may set aside the award or remit it to the tribunal.<sup>15</sup> However, where the tribunal (or member thereof) is biased, remittance is often neither realistic nor acceptable. In addition, s.68(2)(a) AA 1996 is concerned, not with potential breach of duty, but with actual breach of duty. Accordingly, in respect of any such challenge, it would have to be shown that the arbitrator failed to conduct the arbitration fairly, not merely that the arbitrator had some form of personal interest in the outcome. More far-reaching, however, is the second basis for challenge--an application to the court for the arbitrator's removal, under s.24(1)(a) AA 1996. Once the specific arbitrator has been removed, the arbitration of the particular dispute will continue once a replacement is appointed. However, in order to succeed under either provision, it will be necessary for the complainant to overcome any restriction caused by the principles applicable to waiver. A legal right will be taken as having been waived where a party with knowledge of his right (and its infringement) fails to take steps to enforce it. In this regard, a challenge should be made at the earliest opportunity, not least because of s.73(1) AA 1996 which, in reflecting general common law waiver principles, provides that, if a party to an arbitration takes part or continues to take part in proceedings, any objection must be raised at the earliest possible opportunity. A third, less likely, option, is that a party could challenge the award for lack of jurisdiction. If the arbitrator's impartiality was specifically required by the agreement, the challenge could be made under s.67 AA 1996 on the basis of lack of jurisdiction.

The question of bias or partiality of a judge or an arbitrator should be judged from the perspective of a reasonable person, such that the court must consider whether or not the fair-minded observer would consider that there was a real danger of bias. However, if a judge or arbitrator is (or, at the relevant time, was) unaware that he possessed some indirect interest in the outcome of the decision, it could not normally be said that there was a real likelihood of

---

<sup>16</sup> W.Park, *Arbitration's Discontents: Of Elephants and Pornography*, *Arbitration International*, Vol.17, No.3, 263-273, 272-273.

bias on his part. Issues such as religion, ethnic or national origin, gender, age, class, financial status or sexual orientation will not normally be deemed to be relevant to an alleged lack of impartiality, nor would social or educational connections, service or employment backgrounds, political associations, membership of various bodies (such as social, sporting or charitable bodies), or previous business dealings. However, depending on the specific circumstances, they may well be, and the question falls to be determined on a case-by-case basis.

### **3.01. REPEAT ARBITRATORS**

The increase of challenges to arbitrators is perhaps a reflection of the ever-growing community of international arbitration users. For international arbitrators, however, modern practice has raised surprisingly few ethical problems beyond the increasingly awkward requirement of disclosure on appointment and challenges. An emerging type of conflict of interest is repeated appointments creating a new category of arbitrators: “repeat arbitrators”.<sup>17</sup>

The pivotal question is why repeated appointments need attention from the arbitral community? In other words: a) why should repeated appointments be disclosed? Repeated appointments should be disclosed to avoid removal of the arbitrator later in the process of the arbitration and to avoid a party seeking the use of the undisclosed repeated appointment as a reason to challenge or set aside the award. b) who are repeat arbitrators? Repeat arbitrators is a term referring to situations in which the same party or companies belonging to the same group of companies as the party, appoint the same arbitrator in several arbitrations c) when do repeated appointments require disclosure? This is very difficult to define. Repetition of appointment does not necessarily mean monopoly of appointment, however where the repeated appointment has occurred more than once a year, practice has dictated that in such a case perhaps the non-disclosure will lead to arguments on the impartiality and independence of the arbitrator, then such a repeated appointment should be disclosed.<sup>18</sup> d) what consequences follow the failure to disclose? There will not occur an automatic challenge of the arbitrator. Indeed, although failure to disclose may raise eyebrows such a fact should not *per se* lead to disqualification. It should rather be a factor of aggravation in the review of the arbitrator’s independence and impartiality.<sup>19</sup>

---

<sup>17</sup> F-Z Slaoui, *The Rising Issue of Repeat Arbitrator: A Call for Clarification*, Arbitration International, Vol.25, No.1, 103-119, 103-104.

<sup>18</sup> *Ibid*, 109-115.

<sup>19</sup> *Ibid*, 118.

### 3.02. THE CASE LAW

Arbitrators have a general duty to disclose any circumstance that may raise doubts as to their impartiality, regardless of whether or not the parties could have known through due diligence or other available procedural steps.

There is a plethora of cases in England on the apparent bias of arbitrators. Amidst those, of the most recent are *Sierra Fishing Company v Farran*<sup>20</sup>, *Cofely Ltd v Bingham*<sup>21</sup>, and *W Ltd v M SDN BHD*<sup>22</sup> which all have emerged in the recent years and have indeed provided food for thought. *W Ltd v M SDN BHD*<sup>23</sup> is particularly important, because Knowles J. refused to follow the IBA Guidelines and indeed held that they were wrong in including in the non-waivable red list the situation where the arbitrator's law firm advises an affiliate of one of the parties. In *Cofely Ltd v Bingham*<sup>24</sup>, the court removed an arbitrator on the ground of apparent bias where 18 per cent of his appointments and 25 per cent of his arbitrator income over the previous three years derived from cases involving the defendant. Not only did the evidence establish that the defendant routinely influenced arbitrator appointments in his favour, but also that the arbitrator had failed to disclose his past involvement with the defendant, as required by the Chartered Institute of Arbitrators' Code of Professional and Ethical Conduct for Members.

#### 3.02.A. ANALYSIS OF THE CASES

In *Sierra Fishing Company v Farran*<sup>25</sup> Sierra Fishing Company (SFC), a Sierra Leonean company, and its affiliates stipulated a loan agreement with two lenders (Dr Farran and Mr Assad) to finance the purchase of two fishing vessels. The loan agreement provided for an arbitration agreement.<sup>26</sup> When repayments ceased, the lenders introduced an arbitration in London and appointed Mr Zbeeb as their arbitrator in 2012, while SFC and its affiliates did not appoint any arbitrator. Therefore Mr Zbeeb acted as sole arbitrator. In 2012 and 2013, the arbitration proceedings were suspended and settlement negotiations took place in which Mr

---

<sup>20</sup> *Sierra Fishing Company v. Farran* [2015] EWHC 140 (Comm)

<sup>21</sup> *Cofely Ltd v. Bingham* [2016] EWHC 240 (Comm)

<sup>22</sup> *W Ltd v. M SDN BHD* [2016] EWHC 422 (Comm)

<sup>23</sup> *Ibid*

<sup>24</sup> *Cofely Ltd v. Bingham* [2016] EWHC 240 (Comm)

<sup>25</sup> *Sierra Fishing Company v. Farran* [2015] EWHC 140 (Comm)

<sup>26</sup> Antonio Musella and Ziva Filipic, *International arbitration and alternative dispute resolution*, I.B.L.J. 2015, 4, 381-387, 383.

Zbeeb was involved. The settlement agreements were not fully performed, and the lenders recommenced the arbitration, where SFC expressed doubts as to the impartiality of the sole arbitrator. SFC alleged the existence of a relationship between a lender (Farran) and the arbitrator's father (its legal counsel). The sole arbitrator refused to resign, claiming that (i) he had been validly appointed, (ii) the party had to ascertain whether circumstances existed leading to doubts as to his impartiality and (iii) the right to objection had been lost according to s.73 of the Arbitration Act 1996. SFC applied to the High Court to have the arbitrator removed on the ground of apparent bias (pursuant to s.24 of the Arbitration Act 1996). The Court found that there had been apparent bias and removed the sole arbitrator. In fact, the Court analysed if there were circumstances giving rise to justifiable doubts, on his connection, involvement and behaviour, finding justified doubts as to his impartiality. In addition, the Court verified that the applicants lost their right of challenge by first not taking part in the arbitration proceedings and only raising its objection at later stage. The Court considered separately whether the SFC had lost the right to rely on each set of circumstances, deciding that the right was not lost and, notably, also held that when a party has not already been effectively taking part, that their silence, inactivity or even neutral acts are not sufficient to lose the right to object.<sup>27</sup>

In *Cofely Ltd v Bingham*<sup>28</sup> during the arbitration of a construction dispute, the claimant applied under the Arbitration Act 1996 s.24(1)(a) to remove the arbitrator on the ground of apparent bias. The arbitrator had been appointed by the Chartered Institute of Arbitrators at the request of the second defendant, in spite of the claimant's disagreement and proposal for the appointment of a different candidate. Two years later the claimant became concerned about the arbitrator's appointment after a decision in *Eurocom Ltd v Siemens Plc*<sup>29</sup> a case involving the defendant and the same arbitrator where the defendant had been found to have made fraudulent misrepresentations to influence the arbitrator's appointment. The claimant submitted that *Eurocom Ltd v Siemens Plc*<sup>30</sup> encouraged a belief that the defendant was keen to use the arbitrator and exclude other potential arbitrators, possibly because the arbitrator was predisposed to treat the defendant favourably. The court in asserted whether there were circumstances which gave rise to justifiable doubts as to the arbitrator's impartiality resorted to *Locobail (UK) Ltd v Bayfield Properties Ltd*<sup>31</sup> where the Court of Appeal had held that the

---

<sup>27</sup> *Ibid*, 384.

<sup>28</sup> *Cofely Ltd v. Bingham* [2016] EWHC 240 (Comm)

<sup>29</sup> *Eurocom Ltd v. Siemens Plc* [2014] EWHC 3710 (TCC), [2015] B.L.R. 1.

<sup>30</sup> *Ibid*.

<sup>31</sup> *Locobail (UK) Ltd v. Bayfield Properties Ltd* [2000] QB 451



common law test for apparent bias is reflected in s. 24 AA 1996 and that the common law test is that articulated by Lord Hope of Craighead in *Porter v Magill*<sup>32</sup> namely whether “the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.” Lord Hope gave a further explanation of what was meant by “fair-minded” and “informed” in *Helow v Secretary of State for the Home Department*<sup>33</sup>. In addition, the claimants relied on four aspects of the evidence as giving rise to such apparent bias, i.e. the legal and business connection between the arbitrator and the defendant. The Court sought assistance from 2014 IBA Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines), whereby as per General Standard 6 the fact that the arbitrator's law firm may have dealings with one of the parties does not automatically give rise to a conflict of interest requiring disclosure and that all depends on the circumstances of each individual case. However as per the Red List of the IBA Guidelines which lists those circumstances regarded as giving rise to justifiable doubts about the arbitrator's impartiality or independence and is divided into a Non-Waivable Red List and a Waivable Red List, one of only four situations identified in the Non-Waivable Red List is where “*the arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income therefrom*” (paragraph 1.4). Hence the court felt that the state of the evidence in this case would leave the fair-minded observer concluding that there was a real possibility that the relationship between the claimant and the arbitrator fell within these criteria. The above coupled with the involvement of the arbitrator in advising and assisting in the settlement negotiations and in the drafting of the agreements was to be considered in the mind of a fair-minded observer as a ground for bias. The claimant also asserted that the arbitrator's response to its questions, and his defensive and hostile approach, increased concern that he might be biased. The arbitrator argued that the grounds for the application were irrelevant because all the appointments had been made by an appointing body rather than by the defendant itself.

The court granted the application and held that there was apparent and established bias resulting from the arbitrator's relationship with the defendant. It was immaterial that the appointments might have been made by an appointing body rather than by the party itself. The evidence showed that the defendant influenced arbitrator appointments positively or negatively

---

<sup>32</sup> *Porter v. Magill* [2002] AC 357, at [103].

<sup>33</sup> *Helow v. Secretary of State for the Home Department* [2008] 1 WLR 2416 at paras [1]-[3]; See also *Laker Airways Inc v. FLS Aerospace Ltd* [1999] 2 Lloyd's Rep 45 per Rix J at pp. 48–49 and *A v. B* [2011] 2 Lloyd's Rep 591 per Flaux J at paragraphs [21] to [29].

as a matter of general practice by putting forward the name of its chosen representative or a list of potential appointees whom it considered inappropriate, or by identifying required characteristics that would only be shared by a small pool of people. It was particularly significant that it had an appointment "blacklist" whereby arbitrators could fall out of favour depending on their conduct. That would be important for an adjudicator whose appointments and income were materially dependant on cases involving the defendant, following also *Eurocom Ltd v Siemens Plc*<sup>34</sup>. The court also held that it was reasonable for the claimant to enquire into the nature of the relationship between the arbitrator and the defendant and that the arbitrator had requested a meeting whereby he had sought to pre-empt the claimant's information-gathering process by pressurising the claimant into acknowledging that there was no issue to be explored. The Court found that the arbitrator's lack of awareness of his conduct being inappropriate demonstrated a lack of objectivity and an increased risk of unconscious bias and hence that the claimant had established the requisite grounds for removal of the arbitrator.

In *W Ltd v M SDN BHD*<sup>35</sup> is a strange case in that the court denied to follow the IBA Guidelines 2014 para.1.4 which stated that there would be a non-waivable conflict of interest where "the arbitrator or his or her firm regularly advises the party, or an affiliate of the party, and the arbitrator or his or her firm derives significant financial income therefrom". The court commended the objective of the guidelines, but explained why some of the provisions dealing with non-waiver of certain conflict of interest situations were weak and could not be given judicial approval. The applicant sought to challenge an arbitration award on the ground of serious irregularity in the form of apparent bias by the arbitrator due to the fact that they alleged a conflict of interest arising from the fact that the firm of the arbitrator had regularly advised a company which had the same corporate parent as the respondent, and had earned substantial remuneration from doing so. The applicant relied on the fact that the provision in the IBA Guidelines 2014 para.1.4, appeared in a "non-waivable" list, the effect of which was that the parties could not waive the conflict of interest which was said to arise. The court refused the application and the existence of bias stating that the arbitrator operated effectively as a sole practitioner within the firm, using its secretarial and administrative resources for his work as an arbitrator, and such a secretarial support would not amount in the mind of a fair-minded and informed observer as a case or possibility of bias. The court was also of the opinion that the

---

<sup>34</sup> *Eurocom Ltd v. Siemens Plc* [2014] EWHC 3710 (TCC), [2015] B.L.R. 1.

<sup>35</sup> *W Ltd v. M SDN BHD* [2016] EWHC 422 (Comm)

IBA guidelines were not binding on the court but that their sole objective was to assist courts<sup>36</sup> in assessing impartiality and independence. In any case the court felt that in the interest of justice it would be more appropriate to deal with such situations on a case-specific basis and added that there was a tension between some of the "general standards" dealing with independence and impartiality, and inconsistency between the situations included or not included in the non-waivable list.<sup>37</sup>

#### 4. THE POSITION UNDER THE UNCITRAL MODEL LAW

Challenging the arbitrator during proceedings is the earliest possibility for unilateral punitive measures. Parties who wish to challenge should first exhaust possibilities for review by the tribunal itself or the relevant arbitral institution. Parties may then apply to the court that has jurisdiction, which is usually the court at the seat of arbitration.

The UNCITRAL Model Law explicitly states that an arbitrator may be challenged "if he does not possess qualifications agreed to by the parties".<sup>38</sup> On a more fundamental level, one could look to the *nature* of the qualifications agreed to by the parties. Even if the *lex arbitri* does not provide for a specific ground of challenge in this context; the parties agreed to arbitrate under the condition that the arbitrator adjudicating the case would have these qualifications. These qualifications are therefore directly linked to the consent of the parties, which in turn provides the underpinning for the power of the arbitrators to decide the dispute in the first place. Apart from an either *de jure* or *de facto* inability to perform his function,<sup>39</sup> there is no clear ground in the UNCITRAL Model Law to remove an arbitrator for lacking certain qualities if these qualities are not agreed upon by the parties. Other rules have a similar philosophy, i.e. once an arbitrator is appointed, neither of the rules of the International Centre for Dispute Resolution of the American Arbitration Association (ICDR), or of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), or of the Singapore International Arbitration Centre (SIAC), or of the ICC, or of the LCIA provide any clear ground for a challenge on quality either. In this context, practitioners have complained that there are few or no controls on the conduct of an arbitrator after appointment. Lord Hacking has written

---

<sup>36</sup> *Sierra Fishing Company and others v. Farran and others* [2015] EWHC 140 (Comm); [2015] 1 All ER (Comm) 560 at [58] per Popplewell J and *Cofely Limited v. Anthony Bingham* [2016] EWHC 240 (Comm) at [109] per Hamblen J.

<sup>37</sup> As per Knowles J. in paras 26, 33-39, 43, *W Ltd v. M SDN BHD* [2016] EWHC 422 (Comm).

<sup>38</sup> UNCITRAL Model Law 2006 art.12(2).

<sup>39</sup> *Ibid*, art.14(1)

that it is open to parties to make a challenge based on an alleged lack of qualification under the ICC and LCIA rules. His reasoning is that the ICC Rules art.9 and the LCIA Rules art.11 refer to the "ability" and "suitability" of the arbitrator respectively.<sup>40</sup> However, these rules only provide for a ground for the ICC or LCIA Court to refuse appointment. This does not mean the parties can use a lack of ability or suitability as a ground for challenge, especially if proceedings are already well under way.

However, an entirely different situation arises when a party wishes to challenge an arbitrator for an (alleged) lack of impartiality or independence. The vast majority of arbitration laws and institutional rules recognise a lack of independence or impartiality as grounds for a challenge. This includes the UNCITRAL Model Law as well as the institutional rules of the LCIA, the SCC, the Hong Kong International Arbitration Centre (HKIAC) and the ICDR.<sup>41</sup> After an award has been made, a party can apply to set the award aside in the court at the seat of the arbitration. The *lex arbitri* generally sets out the grounds for setting aside an award and a distinction can be made between jurisdictional grounds, procedural defects and legal errors. Under the UNCITRAL Model Law, an arbitral award may be set aside when the party making the application proves that the composition of the arbitral tribunal was not in accordance with the agreement of the parties or the law itself.<sup>42</sup> However, the award is final and binding on the parties if the correct procedures have been followed when appointing the arbitrator and the formalities are observed. There is seldom room for any form of appeal, or for any judicial review of the award on its merits, even if the quality of the decision is very questionable. In the context of impartiality and independence, an award may be set aside under the UNCITRAL Model Law if the applying party proves it was unable to present its case,<sup>43</sup> or if the competent court finds that the award is in conflict with the public policy of its state.<sup>44, 45</sup>

---

<sup>40</sup> Lord Hacking, "Challenges: theirs is to reason why" (2006) 1(6) Global Arbitration Review 27.

<sup>41</sup> See respectively the UNCITRAL Model Law 2006 art.12(1), the LCIA Arbitration Rules 1998 art.10.3, the SCC Rules 2010 art.15(1), the ICDR Arbitration Rules 2009 art.8(1) and the HKIAC Administered Arbitration Rules 2008 art.11.4.

<sup>42</sup> UNCITRAL Model Law 2006 art.34(2)(a)(iv).

<sup>43</sup> *Ibid*, art.34(2)(a)(ii).

<sup>44</sup> *Ibid*, art.34(2)(b)(ii).

<sup>45</sup> L.J.E. Timmer, *The Quality, Independence and Impartiality of the Arbitrator in International Commercial Arbitration*, Arbitration 2012, 78(4), 348-358, 354-356

## 5. THE 2014 IBA GUIDELINES

The ordinary test for impartiality, that a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased, has been amplified in the context of international arbitration by the International Bar Association Guidelines on Conflicts of Interest in International Arbitration, published in 2014.<sup>46</sup>

The current IBA Guidelines were adopted by resolution of the Council of the International Bar Association on 30 October 2014. The original 2004 Guidelines were drafted by a Working Group of 19 experts from 15 countries. In 2012 a review was initiated and this was conducted by an expanded Conflicts of Interest Subcommittee of 27 members from 19 countries “representing diverse cultures and a range of perspectives, including counsel, arbitrators and arbitration users”. The 2014 IBA Guidelines comprise General Standards, Explanatory Notes on Standards, and what are called Application Lists.<sup>47</sup>

Important changes from the 2004 to 2014 Guidelines include provision in General Standard 6(b) to make it clear that third party funders may be considered to be identified with or the equivalent of the party in question. Therefore, the existence of third party funding can be expected to be required to be disclosed. Further, General Standard 7(b) has now clarified that it is the responsibility of the parties to inform the arbitrators of the identity of their legal representatives and counsel and to identify whether any relationship exists between those representatives and the arbitrators. Included now in the Orange list for the first time is whether an arbitrator and co arbitrator, or arbitrator and party counsel are currently acting or have acted together as co-counsel in another matter in the last three years. Green matters need not be disclosed. The entire process is not binding, does not have any force of law or contract. No international arbitration institution has actually adopted the Guidelines. Both the LCIA and the ICC in considering whether to confirm or uphold a challenge to a nominee have indicated that they do not simply apply or adopt the Guidelines. Nevertheless, in the wider community of international arbitration amongst practitioners and arbitrators, the Guidelines have gained traction. The process of identification and categorisation of specific examples of potential problem has been found to be helpful to arbitrators and parties alike. Frequently parties feel uneasy about raising a question over an appointee’s independence. The IBA Guidelines give

---

<sup>46</sup> R. Merkin, *Arbitration Law*, Informa, 2016, Ch. 10. 10.22-10.33; D.S.J. Sutton, J.Gill, M.Gearing, *Russel on Arbitration*, 24th Ed, Sweet & Maxwell, 2015, Ch. 4 paras. 4-011,4-022, 4-101 – 4-162.

<sup>47</sup> Described as lists of “specific situations indicating whether they warrant disclosure or disqualification.

parties confidence and a tangible underpinning for such questions to be raised.

Those purporting that the 2014 IBA Guidelines have no other role than to assist in assessing impartiality and independence, commend their value but are sceptical of the fact that the 2014 IBA Guidelines contain no specific explanation of why the change was made to the text of Paragraph 1.4 of the Non-Waivable Red List so as to include the situation where the arbitrator's firm regularly advises a party, or an affiliate of a party, but the arbitrator does not. They also seem to maintain this positions in spite of the fact that Paragraph 2 of Part II of the 2014 IBA Guidelines, under the heading "Practical Application of the General Standards", expressly qualifies the proposition that the Non-Waivable Red List details specific situations that give rise to justifiable doubts as to the arbitrator's impartiality and independence with the phrase "depending on the facts of a given case". They also contempt that it is for two reasons that it is unlikely that the IBA Guidelines will become the predominant influence in the disposal of s.24 or s.68 applications in the Commercial Court, i.e. first, because the IBA Guidelines address the twin pillars of impartiality and independence, whereas the AA 1996 only refers to impartiality and secondly because as they purport, in practice a great number of the most commonly encountered problems are of the distinct Orange variety. Notwithstanding the above arguments, there is one aspect of the 2014 IBA Guidelines which has undoubtedly been of considerable influence, i.e. the question of disclosure and the need and desirability of continuing disclosure in arbitration.

Those in favour of the stance that the 2014 IBA Guidelines have a more binding effect other than being guidelines as their name dictates, stress out the fact that the IBA Working Group that finalized them engaged in a careful scrutiny and continuous debate of their national legal systems so as to finalize the selection of credible, efficient and fair guidance in resolving difficult conflict issues impacting on the parties, arbitrators, international organisations, states and their courts alike. They also support the logical view that although not carved in stone, they were intended to provide guidance in identifying, responding to and resolving conflicts by both codifying existing arbitral practice and filling gaps in the law to arrive at the most suitable international arbitral practice. Moreover, it is submitted that they provide additional information and further assistance in regard to how to resolve issues of independence and impartiality in a range of illustrative scenarios, or "situations" contained in the relevant lists.<sup>48</sup>

The Guidelines provide a general definition of Impartiality and Independence, in art.

---

<sup>48</sup> L. Trackman, *The Impartiality and Independence of Arbitrators Reconsidered*, Int. A.L.R. 2007, 10(4), 124-135, 128-129.

2.1.<sup>49</sup> It is perhaps more logical for independence to precede impartiality. The Guidelines also follow the Model Law in setting an objective standard for the disqualification of an arbitrator on grounds of partiality or lack of independence. An arbitrator shall decline appointment or refuse to continue to act as an arbitrator if facts or circumstances exist that, from a reasonable person's point of view having knowledge of the relevant facts, give rise to “justifiable doubts” as to the arbitrator's impartiality or independence.

Perhaps the most useful, and also one of the most troubling aspects of the IBA Guidelines is its categorisation of “situations” into which arbitral impartiality and independence are divided. Based on a variety of cases in multiple jurisdictions, the Working Group broke up different factual situations giving rise to concerns about conflict of interest into three lists: Red, Orange and Green. The Red List consisted of situations which give rise to per se doubt as to an arbitrator's impartiality and independence. This list is again divided into situations that cannot be waived by the parties and those that can be so waived. The Orange List consists of specific situations in which the parties might reasonably have doubts about the arbitrator's impartiality or independence. The arbitrator has a duty of disclosure in such cases; however, the parties can waive, or be deemed to waive, that duty. The Green List consists of situations in which there is no appearance of partiality or a lack of independence and no conflicts of interest. The benefit of the lists is that they provide a cross-section of illustrations based on past practice in which arbitrators and parties can identify situations of conflicts of interest, as well as the perceived significance of that conflict, and in the case of the Red List, how parties can cure conflicts through consent. The problem is that the lists also provide litigious parties with a list of circumstances in which they might ground such a challenge, spuriously or not.

The 2014 IBA Guidelines are not binding on the English courts, but have been used to provide guidance, as a check on the decision reached by the court.<sup>50</sup>, <sup>51</sup> The 2014 IBA Guidelines are innovative in finding new solutions to old problems. At the same time, they are not without controversy. Among the more controversial, the 2014 IBA Guidelines impose a shared obligation on arbitrators and parties to make reasonable enquiries to uncover any potential conflicts of interest at the outset of the arbitration. However, shifting part of the

---

<sup>49</sup> Article 2.1 states: “An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties.”

<sup>50</sup> R. Merkin, *Arbitration Law*, Informa, 2016, Ch. 10., 10.21.; D.S.J. Sutton, J.Gill, M.Gearing, *Russel on Arbitration*, 24th Ed, Sweet & Maxwell, 2015, Ch. 4 paras. 4-011,4-022, 4-101 – 4-162.

<sup>51</sup> *A v. B* [2011] EWHC 2345 (Comm); *Sierra Fishing Co v. Farran* [2015] EWHC 140 (Comm); *Cofely Ltd v. Bingham* [2016] EWHC 240 (Comm); *H v. L and Ors* [2017] EWHC 137 (Comm).

burden to uncover material conflicts to the parties may well be realistic insofar as the parties often are in a better position to identify conflicts than the arbitrators. Such novelty should not be unwelcomed as reform is always entailing some cost and adopted solutions cannot lead to positive outcomes for all groups. Overall, the 2014 IBA Guidelines represent meaningful progress.<sup>52</sup> However, the 2014 IBA Guidelines have in at least one respect, i.e. in the case of *W Ltd v. M SDN BHD*<sup>53</sup> been regarded as too rigid. As our discussion illustrated, *W Ltd v. M SDN BHD*<sup>54</sup> shows the limits of the principle that remote relationships involving legal advice do not give rise to potential bias. As suggested<sup>55</sup> the ruling by Knowles J. in *W Ltd v. M SDN BHD*<sup>56</sup> whereby he supported the view that there was no basis for any suggestion of potential bias, and that paragraph 1.4 ought not to be in the Non-Waivable Red List, was incorrect in equating advice given to a party to the arbitration and to an affiliate to a party to the arbitration and failed to take account of whether on the facts of the case there could be a realistic effect on impartiality or independence. The principle that there is no apparent bias because the arbitrator is a lawyer with connections to the lawyers of one of the parties may, however, break down where there have been allegations of dishonesty as shown in cases such as *Sierra Fishing Co v. Farran*<sup>57</sup> and *Cofely Ltd v. Bingham*<sup>58</sup>. The latter case serves as proof that an arbitrator who becomes commercially reliant on a party faces a finding that there are objective grounds to question his independence, however there are necessarily limits on this, as this has been pointed out by Popplewell J. in *H v. L and Ors*<sup>59</sup> which shapes the principle that single events can give rise to multiple disputes and the expert arbitrators in that field may find themselves called upon in more than one case which in turn might be advantageous in terms of the speed with which any one matter can be resolved.<sup>60</sup>

---

<sup>52</sup> L. Trackman, *The Impartiality and Independence of Arbitrators Reconsidered*, Int. A.L.R. 2007, 10(4), 124-135, 134-135.

<sup>53</sup> *W Ltd v. M SDN BHD* [2016] EWHC 422 (Comm)

<sup>54</sup> *Ibid.*

<sup>55</sup> R. Merkin, *Arbitration Law*, Informa, 2016, Ch. 10.; D.S.J. Sutton, J.Gill, M.Gearing, *Russell on Arbitration*, 24th Ed, Sweet & Maxwell, 2015, Ch. 4 paras. 4-011,4-022, 4-101 – 4-162.

<sup>56</sup> *W Ltd v. M SDN BHD* [2016] EWHC 422 (Comm)

<sup>57</sup> *Sierra Fishing Co v. Farran* [2015] EWHC 140 (Comm);

<sup>58</sup> *Cofely Ltd v. Bingham* [2016] EWHC 240 (Comm)

<sup>59</sup> *H v. L and Ors* [2017] EWHC 137 (Comm).

<sup>60</sup> R. Merkin, *Arbitration Law*, Informa, 2016, Ch. 10.; D.S.J. Sutton, J.Gill, M.Gearing, *Russell on Arbitration*, 24th Ed, Sweet & Maxwell, 2015, Ch. 4 paras. 4-011,4-022, 4-101 – 4-162.



## **6. THE 2017 SINGAPORE INTERNATIONAL ARBITRATION CENTRE (SIAC) PRACTICE NOTE PN – 01/17 (31.3.2017)**

The growth in litigation funding, and its spread to arbitration, has given rise to the risk that arbitrators are linked with the funding companies. In March 2017, the Singapore International Arbitration Centre (SIAC) adopted guidance for arbitrators regarding disclosure in relation to cases involving external funding.

The guidance set as Practice Note PN-01/17 (31.3.2017) sets out standards of practice and conduct to be observed by arbitrators in respect of arbitration proceedings administered by the SIAC, under the Arbitration Rules of the Singapore International Arbitration Centre (“SIAC Rules”) where the involvement of an External Funder in arbitration proceedings is permissible.

The Practice Note was not ever meant to supplement an arbitrator’s obligations under the SIAC Rules, and is not intended to replace any existing ethical standard or code of conduct which may apply to arbitrators under any applicable arbitration agreement, professional or disciplinary rules, or mandatory laws and regulations.

Under article 4 of Practice Note PN-01/17 (31.3.2017) it is stated, in relation to impartiality and independence, that any potential candidate for appointment as an arbitrator shall disclose to the Registrar and the Disputant Parties, any circumstances that may give rise to justifiable doubts as to his impartiality or independence, including any relationship whether direct or indirect, with an External Funder, as soon as reasonably practicable and in any event before his appointment.

Similarly, under articles 5-8 of Practice Note PN-01/17 (31.3.2017) it is stated, in relation to disclosure that: a) unless otherwise agreed, the arbitral tribunal shall have the power to conduct such enquiries as may appear as necessary or expedient, which shall include ordering the disclosure of the existence of any funding relationship with an external funder and/or the identity of the external funder and, where appropriate, details of the external funder’s interest in the outcome of the proceedings, and/or whether or not the external funder has committed to undertake adverse costs liability (art. 5); b) an arbitrator is under the duty to immediately disclose to the parties, the other arbitrators and to the registrar any circumstances that may give rise to justifiable doubts as to his impartiality or independence, including any relationship whether direct or indirect, with an external funder, that may be discovered or arise during the arbitration proceedings (art. 6); c) the arbitral tribunal might request that the parties agree to inform the arbitral tribunal and the registrar, at the earliest opportunity, of the involvement of an external funder in the arbitration proceedings or any withdrawal or change

of external funder (art. 7); and d) the arbitral tribunal has the duty to inform the parties of their continuing obligation to inform the arbitral tribunal and the registrar, at the earliest opportunity, of the involvement of an external funder in the arbitration proceedings or any withdrawal or change of external funder (art. 8).

In an era where the norm tends to have become to have funding in both litigation and in arbitration, the position of SIAC in adopting such a stance to safeguard the interests of the disputant parties and to promote arbitral efficiency by stipulating such details rules in relation to the disclosure duties of arbitrators as well as the threshold for their independence and impartiality in relation to cases of external funding, is remarkable. Those who will rush into criticising the imposition of such rules as too restrictive and hence as per their view destructive rather than constructive for arbitration, should think twice before endorsing such a view.

## **7. THE POSITION IN OTHER JURISDICTIONS**

### **7.1. THE UNITED STATES**

Even though the ABA/AAA Code of Ethics contemplates party-appointed arbitrator predisposition, the nominee to an international arbitration with its seat in the United States must be careful not to adopt such a posture unless clearly authorized by the parties. International arbitrations held in the U.S. are governed by the Federal Arbitration Act (9 USCS) (FAA) which pre-empts any conflicting State legislation. The FAA requires all members of an arbitral tribunal to maintain the same degree of impartiality. In the *Standard Tankers (Bahamas) Co. Ltd. v Motor Tank Vessel, AKTI*<sup>61</sup> case it was held that court shall vacate an award where there was evident partiality or corruption in the arbitrators and that the evident partiality test should apply to every member of the panel. Generally speaking, in American practice the degree of partiality to be avoided is that of evident partiality which is more than a mere appearance of bias but less than actual bias. Evident partiality would be found where a reasonable person would have to conclude that an arbitrator was partial to one party.<sup>62</sup> This standard, which is widely used by USA courts to challenge an arbitrator for bias, is less stringent than that appropriate for a judge because of the commercial reality that arbitrators will often have some degree of professional association with the parties or familiarity with the subject in issue. A

---

<sup>61</sup> *Standard Tankers (Bahamas) Co. Ltd. v. Motor Tank Vessel, AKTI* 438 F. Supp. 153 (1977) at 159.

<sup>62</sup> *Morelite Const. Corp. v. New York City District Council Carpenters Benefit Funds*, 748 F. 2d 79 (1984).

curious gap in the FAA leaves the parties no avenue of judicial review of an appointment until after an award has been rendered unless the rules of procedure adopted provide for earlier review.<sup>63</sup> This is unfortunate in that a party with a valid objection to the composition of the tribunal would have to make the objection on the record and then wait until the end of the case before challenging the award itself.

The FAA does not specify any duty of disclosure of interest in or connection with the dispute or the parties but the courts have interpreted the duty of avoiding evident partiality as including a strict duty of disclosure. The Supreme Court of the United States set a very high standard in the *Commonwealth Coatings Corp. v Continental Casualty Co.*<sup>64</sup> case by requiring disclosure of any dealings which might create an impression of bias. In that case the award was set aside even though the award was unanimous and there was a finding that there was no actual bias. One of the arbitrators had failed to disclose material facts regarding business connections with one of the parties. However, Mr Justice White, in a judgment concurring in the majority decision, stated that remote business connections need not be disclosed and that the Act did not call for a complete and unexpurgated business biography.<sup>65</sup> The same requirement of disclosure would extend to social connections with the parties, their counsel and perhaps witnesses.<sup>66</sup> There is likewise no specific statutory prohibition against *ex parte* communications with the parties but such a requirement in all but the most trivial of circumstances would be subsumed under the rule against evident partiality. The FAA also does not address the issue of whether a majority award is required. This would be left to the parties to decide ad hoc or through the adoption of institutional rules.<sup>67</sup>

## 7.2. FRANCE

In France, international commercial arbitrations are governed by Articles 1442 to 1507 of the Code of Civil Procedure. Arbitrators in France are held to the same standard of impartiality as a judge and no distinction is made between the standard expected of a party-appointed arbitrator and that of the third arbitrator. The requirements for a judge are found in Article 341 of the Code of Civil Procedure but this Article does not specifically refer to arbitrators.

---

<sup>63</sup> *Florasynth, Inc. v. Pickholz* 750 F. 2d 171 (1984); *Hunt v Mobil Oil Corp.*, 583 F. Supp. 1092 (1984).

<sup>64</sup> *Commonwealth Coatings Corp. v. Continental Casualty Co.* 393 U.S. 145 (1968).

<sup>65</sup> *Commonwealth Coatings Corp. v. Continental Casualty Co.* 393 U.S. 145 (1968) at 152.

<sup>66</sup> *Merit Ins. Co. v. Leatherby Ins. Co.* 714 F.2d 673 (1983).

<sup>67</sup> M.L. Smith, *Impartiality of the Party-Appointed Arbitrator*, *Arbitration* 1992, 58(1), 30-42, 31-33.

There is some debate as to the right of a party to an arbitration governed by French law to seek judicial review of an appointment when the parties have provided for a review mechanism through the adoption of institutional rules such as the ICC Rules. In most respects the courts will not review the final ruling of a body such as the ICC regarding the composition of a tribunal since this is viewed as within the exclusive competence of the institution as an administrative not jurisdictional matter. But doubt exists as to whether this would be restricted only to matters of pure formality and not questions of bias.

By the same reasoning, Article 1504 of the Code of Civil Procedure would allow an arbitral award in France in international arbitral proceedings to be set aside by a court where an arbitrator lacked impartiality. The foregoing comment on French law is also relevant to the ground for refusal of recognition and enforcement under Article V para. (2) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards for violation of public policy. Challenges to an arbitrator may be brought during the course of the proceedings, as per articles 1457 and 1463, and article 1452 requires disclosure of any personal cause of disqualification the arbitrator has knowledge of. *Ex parte* communications would be prohibited under the general rule requiring impartiality and Article 1469 specifically states that the deliberations are secret. Finally, article 1470 provides that the award is to be rendered by majority vote.<sup>68</sup>

### **7.3. SWITZERLAND**

International arbitrations are covered by the Swiss International Arbitration Law which is Chapter 12 of the Swiss Private International Law Act. Where at least one of the parties is not domiciled or habitually resident in Switzerland, the Swiss Private International Law Act replaces cantonal law unless the parties choose otherwise (Article 176).

Considerable autonomy is left to the parties regarding the composition of the arbitral tribunal and if for example the parties have chosen the ICC Rules, the Swiss courts will not interfere in matters related to the appointment, removal or replacement of arbitrators as prescribed by the Institution. (Article 179) These matters are viewed as administrative. However, like France, there is an exception with respect to impartiality of the arbitrators. Article 180(1) (c) provides for the challenge of an arbitrator if circumstances give rise to justifiable doubts as to his independence. The restriction only to the case of doubts as to the

---

<sup>68</sup> *Ibid*, 34.

arbitrator's independence and not also in relation to the arbitrator's alleged impartiality in the new law is an attempt by Swiss law to restrict the requirement to the more objective notion of independence alone as a compromise designed to meet the exigencies of practice. In addition, such an absence of a requirement of impartiality might also be seen to allow for a party-appointed arbitrator who is predisposed to his nominating party but it is submitted that this would not be a correct conclusion to draw. The Swiss Private International Law Act is silent as to prohibition of *ex parte* communications with the parties and the confidentiality of the deliberations.<sup>69</sup>

#### **7.4. ITALY**

The rules of Italian Law governing arbitration are mostly contained in the Civil Procedure, Fourth Book, Eighth Title, art. 806-840. Law no. 25 which was passed on 5 Feb. 1994 brought substantive changes to the way the Italian legislature addressed arbitration. Article 836 of the Italian Civil Procedure Code deals with the issue of challenge and removal of arbitrators and provides for specific substantial and procedural rules, i.e. the duty of a judge to abstain from the procedure upon the occurrence of the cases enumerated in art. 51,52 of the Italian Civil Procedure Code. In addition, the AIA (Italian Association for Arbitration) and the Milan International Arbitral Chamber through their rules impose on arbitrators a duty to disclose facts and circumstances relevant to their independence. In addition article 55 of the Ethical Code of the Italian Bar Association is devoted to ethical standards that a practising lawyer acting as arbitrator must abide with. The subject of impartiality of arbitrators is dealt with efficiently under Law no. 25 of 5 Feb. 1994. Parties are free to decide the selection of arbitrators and the criteria for their disqualification in case of impartiality. If not such agreement is made arbitrators are bound by the same criteria as judges in relation to impartiality and independence (art. 51,52 Italian Civil Procedure Code).<sup>70</sup>

#### **7.5. CANADA**

Under Canadian constitutional law every jurisdiction has authority to enact legislation governing international arbitrations. All of Canada's ten provinces and two territories have

---

<sup>69</sup> *Ibid*, 35.

<sup>70</sup> T. Tampieri, *International Arbitration and Impartiality of Arbitrators, The Italian Perspective*, Journal of International Arbitration, 18(5) 549-571, 2001, 570-571.

enacted legislation concerning international arbitrations. There is also a federal act which governs international cases to which a federal entity is a party. This article will consider the International Commercial Arbitration Act (ICAA) of British Columbia (S.B.C. 1986, Ch. 14) as representative of legislation based on the UNCITRAL Model Law. Prior to the adoption of the Model Law the Supreme Court of Canada in the case of *Szilard v Szasz* [1955] S.C.R. 3, held that the parties to an arbitration are entitled to a sustained sense of confidence in the independence of mind of the arbitrators. Even a reasonable apprehension that an arbitrator was not acting impartially would lead to the award being set aside. The provisions of the Model Law did not alter this judge-made rule. Article 18 of the Model Law (s. 18 ICAA) requires that the parties be treated with equality. Article 11 (s. 11 ICAA) requires consideration of the independence and impartiality of the nominee when it falls to a court to make a nomination when other appointment procedures fail. Article 13 (s. 13 ICAA) provides for judicial review of a challenge to an arbitrator where there are justifiable doubts as to the independence or impartiality of an arbitrator arising out of circumstances which become apparent to a party after the appointment of that arbitrator. Article 34 (s. 34 ICAA) provides for an award to be set aside if it is in conflict with the law or is contrary to public policy, both of which require impartiality on the tribunal. Disclosure by an arbitrator of any circumstances likely to give rise to justifiable doubts as to impartiality or independence is required pursuant to Article 12 (s. 12 ICAA). A duty of disclosure was also highlighted in the *Szilard v Szasz* [1955] S.C.R. 3 case. Under the Model Law the same standard of impartiality and independence is applied to all members of the tribunal. The Model Law and ICAA are silent as to a prohibition on communication with the parties outside the hearing except that the ICAA does provide for involvement in mediation and conciliation or other procedures by the tribunal to encourage settlement (s. 30). There is no specific reference in these laws to the secrecy of deliberations but it would be expected that any significant communication with the parties would violate the duty of impartiality. Unless otherwise agreed by the parties, decisions must be made by a majority (Article 29 Model Law and s. 29 ICAA).<sup>71</sup>

## 7.6. AUSTRALIA

On 17 June 2010, the Australian Federal Parliament passed a law making certain amendments to the International Arbitration Act 1974 (Cth) (IAA), amongst which were

---

<sup>71</sup> *Ibid*, 36.

provisions adopting the real danger test as the standard for bias challenges to international arbitrators. On 22 June 2010, the real danger standard was also enacted as part of the New South Wales domestic Commercial Arbitration Act 2010 (NSWCAA) making Australia the first country to incorporate the real danger test into its written arbitration law, and the first member of the UNCITRAL Model Law community of states to make 'Model Law Plus' additions in the area of arbitrator independence and impartiality.<sup>72</sup>

The adoption of the real danger test has been made as an elucidation to the challenge rule set out under Model Law, art. 12. Australian common law recognises the test for apparent bias laid down in *R. v. Sussex Justices Ex p. McCarthy*.<sup>73</sup> To date, this test has been held to be applicable to arbitrators as well as judges and other tribunal members. However, the amendment to incorporate the real danger test materially alters the Common Law position insofar as it applies to arbitrators.

Section 18A of the IAA provides firstly that the purposes of Article 12(1) of the Model Law, there are justifiable doubts as to the impartiality or independence of a person approached in connection with a possible appointment as arbitrator only if there is a real danger of bias on the part of that person in conducting the arbitration and secondly that for the purposes of Article 12(2) of the Model Law, there are justifiable doubts as to the impartiality or independence of an arbitrator only if there is a real danger of bias on the part of the arbitrator in conducting the arbitration, {emphasis added} The same approach is taken in section 12 of the NSWCAA. The drafting of the amendment to incorporate the real danger test is such that the Model Law notion of justifiable doubts is preserved in IAA, section 18A, with the real danger test functioning more as an internal evidentiary standard rather than a rule in its own right. This is consistent with the judiciary approach in England in *R. v. Gough*<sup>74</sup>, where the courts applied the then-applicable common law real danger test to challenges under section 24(1)(a) of the AA 1996 which borrows justifiable doubts from article 12 of the Model Law.

However, it is important to observe that there is a gap between the text of section 18A and the elements of the test deployed in *R. v. Gough*.<sup>75</sup> The test deployed in *R. v. Gough*<sup>76</sup> stated that after having ascertained the relevant circumstances, the Court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant

---

<sup>72</sup> S. Luttrell, *Australia Adopts the Real Danger Test for Arbitrator Bias*, (2010) 26 *Arbitration International* 625-632, 625.

<sup>73</sup> *R. v. Sussex Justices Ex p. McCarthy* [1924] 1 K.B. 256

<sup>74</sup> *R. v. Gough* [1993] A.C. 646.

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*

member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him. The main difference between the test laid down in *R. v. Gough*<sup>77</sup> by Lord Goff of Chieveley and the content of IAA, section 18A is vantage. Where the test as set out in *R. v. Gough*<sup>78</sup> has two arms - the first arm being reasonable court vantage and the second arm being the real danger standard itself - IAA, section 18A is express only in respect of the second arm. It might therefore be suggested that the first arm of the test in *R. v. Gough*<sup>79</sup> is not necessarily part of IAA, section 18A, or NSWCAA, section 12.<sup>80</sup>

Notwithstanding the above remark, although the submissions did propose the adoption of court vantage for bias challenges to arbitrators, which was expressed as the opinion of the court, nevertheless this aspect of the proposal was not taken up by the Attorney General in the amendment to incorporate the real danger test. This begs the question of whether actually the IAA, in its section 18A does incorporate both arms of the amendment to incorporate the real danger test as set in *R. v. Gough*<sup>81</sup> or just the real danger standard. Certainly, the wording of section 18A IAA leaves open at least two possible outcomes, i.e. a) that the real danger standard applies, but the first arm (vantage) as set in *R. v. Gough*<sup>82</sup> remains a Common Law matter and b) that the real danger standard applies, and so does the first arm as set in *R. v. Gough*<sup>83</sup>, with the effect that the common law test for apparent bias of arbitrators is taken to have been replaced *telle quelle*.

It is supported<sup>84</sup> that at least at first instance an Australian court would seek to preserve the common law to the extent it could, and that the outcome purporting the application of the real danger standard alongside the preservation of the first arm as set in *R. v. Gough*<sup>85</sup> as a common law issue, not least due to the fact that the Australian courts have consistently placed a high priority on the observance of the principle that justice must not only be done but also be seen to be done. Bearing this principle in mind, one may also conclude that the Australian

---

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*

<sup>80</sup> S. Luttrell, *Australia Adopts the Real Danger Test for Arbitrator Bias*, (2010) 26 *Arbitration International* 625-632, 626-627

<sup>81</sup> *R. v Gough* [1993] A.C. 646.

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*

<sup>84</sup> S. Luttrell, *Australia Adopts the Real Danger Test for Arbitrator Bias*, (2010) 26 *Arbitration International* 625-632, 631.

<sup>85</sup> *R. v Gough* [1993] A.C. 646.



courts are expected to adopt this position because the fair minded lay observer approach expressly personifies this maxim.<sup>86</sup>

## 8. CONCLUSIONS

In arbitration, and in relation to its' use as a method of alternative dispute resolution, the fact that arbitration proceedings are conducted behind closed doors, by people who are professionally linked to each other, increasingly gives rise to questions of independence. Hence arbitral party perceptions about what constitutes a doubt on the independence and impartiality of arbitrators vary, as per the different legal cultures.

Even though existing solutions may be objective, yet they are applied in a highly subjective manner. This is understandable given the fact that at least impartiality, if not also independence, is an abstract concept, as well as due to the fact that its appraisal would necessarily involve an element of subjectivity. It is submitted that any arising problems may be minimised if policy considerations behind the usage of a particular solution are given due weight.

Nowadays, a separate norm for arbitrators emerges as an even more than ever need. In an era of transparency such as the contemporary one, the stakes in any dispute are very high and it is submitted that other policy objectives, such as keeping the process cost effective et al., are not given as much importance as the independence and impartiality of the arbitrator. Thus, the perception of the parties should be duly considered. Any doubt should be resolved in favour of disqualification to enhance the integrity of the arbitral process.

The increase of challenges to arbitrators is a consequence of the popularity and growth of arbitration as a method of alternative dispute resolution. Arbitrators should strive to be independent and impartial and have a general duty to disclose any circumstance that may raise doubts as to their impartiality and result in their appointment being judged as biased. This need for independent and impartial arbitral tribunals was demonstrated in recent case law such as *Sierra Fishing Company v Farran*<sup>87</sup>, *Cofely Ltd v Bingham*<sup>88</sup>, and *W Ltd v M SDN BHD*<sup>89</sup>. In

---

<sup>86</sup> S. Luttrell, *Australia Adopts the Real Danger Test for Arbitrator Bias*, (2010) 26 Arbitration International 625-632, 632.

<sup>87</sup> *Sierra Fishing Company v. Farran* [2015] EWHC 140 (Comm)

<sup>88</sup> *Cofely Ltd v. Bingham* [2016] EWHC 240 (Comm)

<sup>89</sup> *W Ltd v. M SDN BHD* [2016] EWHC 422 (Comm)

*Sierra Fishing Company v Farran*<sup>90</sup> the Court found that there had been apparent bias in the conduct of the sole arbitrator. In *Cofely Ltd v Bingham*<sup>91</sup> the court articulated the reasons which would be capable of classifying in the mind of a fair-minded observer a ground for bias. In *W Ltd v M SDN BHD*<sup>92</sup> the court denied to follow the IBA Guidelines 2014 and classified them as solely a soft non-binding aid to the courts when assessing impartiality and independence.<sup>93</sup> The above allows us to conclude that the treatise of the issue of bias or arbitrators continues to receive a sparse, non-consistent and hence fragmented treatment by the courts. Lord Mustill believes that arbitrators stand squarely between the two parties and having no special affiliation to either because the right to nominate is part of the procedure for bringing the tribunal into existence. Once the arbitrator has accepted his office, all connection with his appointer becomes a matter of history.<sup>94</sup> This model of rigid impartial independence however, does not accord with the courts' treatment of the parties' expectation of independence and impartiality. In fact, the courts both in the USA and England have essentially rejected appearance of bias and have interpreted justifiable doubts in a manner that makes it extremely difficult to sustain a challenge to an arbitrator's impartiality or independence. That is, the courts have overruled the lower threshold standards argued by the plaintiff who is the paying customer, and have imposed a stricter standard that leads away from considering the issue from the parties' eyes. In this sense, the courts' interventions on the issue of independence and impartiality show that it is incorrect to say that the arbitration agreement is the root of international commercial arbitration.<sup>95</sup>

In defining bias, there is one interesting difference between English law and others, particularly civil law systems and certainly those jurisdictions which have adopted the Model Law or which take a Model Law approach, i.e. the distinction between impartiality and independence. The Model Law (art. 12) specifies justifiable doubts as to the independence (as well as impartiality) of an arbitrator as grounds for his removal. There is no proof however that, in consensual arbitrations, this is either required or desirable. So, what therefore should we try to do? To answer this question one needs first to decide as a matter of policy which is the greater mischief, i.e. the compromise of the integrity of the process through the definition of impartiality by a very wide standard, or the adoption of a narrow standard, which bears the

---

<sup>90</sup> *Sierra Fishing Company v. Farran* [2015] EWHC 140 (Comm)

<sup>91</sup> *Cofely Ltd v. Bingham* [2016] EWHC 240 (Comm)

<sup>92</sup> *W Ltd v. M SDN BHD* [2016] EWHC 422 (Comm)

<sup>93</sup> As per Knowles J. in paras 26, 33-39, 43, *W Ltd v. M SDN BHD* [2016] EWHC 422 (Comm).

<sup>94</sup> M Mustill and S Boyd, *The Law and Practice of Commercial Arbitration in England* (2nd edn 1989), at 223.

<sup>95</sup> H.L., Yu, *Independence, Impartiality and Immunity of Arbitrators - US and English Perspectives*, I.C.L.Q. 2003, 52(4), 935-967, 963.

danger to result in hindering altogether the integrity and efficacy of the process via too many and unmeritorious challenges, motivated often only by tactical considerations and sometimes crossing the line between permissible guile and sharp practice. It is suggested that perhaps the latter is the greater mischief.<sup>96</sup> In the legislative regimes examined herein, international arbitrators must remain independent and impartial unless the parties choose otherwise. Although couched in different language, each of the countries requires a similar general standard of impartiality. In the USA, an arbitrator must avoid evident partiality. In England, the test is a real suspicion of bias. France requires an objective appearance of impartiality as would be expected of a judge. Italy promotes the principle of party autonomy in allowing parties to choose the criteria for impartiality and independence of the arbitrators, otherwise applies the relevant rules of the Italian Code of Civil Procedure (art. 51,52). No test has yet been established under the new Swiss law. In Canada, an arbitrator in an international proceeding could be disqualified if there is a reasonable apprehension of bias. In Australia, the 2010 amendment of the IAA to include the real danger test, introduced a somewhat higher bar for challenges than the one usually<sup>97</sup> by requiring that a fair minded and informed observer would say that there was a real possibility that the arbitrator was biased.

Courts have used several standards in various jurisdictions when applying the impartiality and independence principle. Many Common Law jurisdictions have adopted a test based on the notion that justice must be seen to be done<sup>98</sup> and the same test was adopted in Australia.<sup>99, 100</sup>

In all systems canvassed, the degree of independence may vary based on circumstances and commercial realities. A limited degree of connection with the parties, is not, and should not, generally be viewed or perceived as a violation of public policy. Strict requirements of disclosure of relationships to the parties or the dispute are required in all of the systems. Rules of disclosure will usually resolve any problems with independence. Impartiality is not so flexible as a concept. There is much less tolerance with respect to a lack of impartiality in the conduct of the arbitration. Absent clear authorisation from the parties, partiality will be a valid ground for challenge of an arbitrator. Where the evidence of partiality was not discovered until after the award, the award itself or its enforcement may be challenged. It falls to the arbitrators

---

<sup>96</sup> A. Marriott, *Conflicts of Interest*, Arbitration 2002, 68(1), 31-41, 41

<sup>97</sup> I.e. the real possibility test, used in *Porter v Magill* [2001] UKHL 67; [2002] A.C. 357.

<sup>98</sup> As demonstrated in *R. v. Sussex Justices Ex p. McCarthy* [1924] 1 K.B. 256 as per which what is required is that a fair minded and informed observer would have a reasonable apprehension that the arbitrator was biased.

<sup>99</sup> The High Court of Australia adopted this test in *Johnson v Johnson* (2000) 201 C.L.R. 488, 492.

<sup>100</sup> However, the test was originally used in *R. v Gough* [1993] A.C. 646.

to maintain strict impartiality both as a matter of law and of professionalism. In addition, where an impartial tribunal is chosen or required by law it is incumbent upon the national court having jurisdiction to enforce requirements of independence and impartiality. This is one area where the courts should not adopt the hands-off approach typical of arbitration if they are vigilant in protecting the fundamental equation that such an arbitration is premised upon, that is, that the case will be decided by an independent and impartial tribunal on the basis of evidence put forward and for no other reason.<sup>101</sup>

The 2014 IBA Guidelines reinforce the protection of impartiality in arbitration. A fundamental principle underlying them is that each arbitrator must be impartial and independent of the parties at the time he or she accepts an appointment to act as arbitrator, and must remain so during the entire course of the arbitration proceeding, including the time period for the correction or interpretation of a final award under the relevant rules, assuming such time period is known or readily ascertainable. Similarly, they dictate the need for the arbitrator to decline the appointment if he has doubts as to his or her ability to be impartial and independent and set an objective test for disqualification. As to the much criticised “Non-Waivable Red List” of the 2014 IBA Guidelines, it simply describes circumstances that necessarily raise justifiable doubts as to the arbitrator’s impartiality or independence. The 2014 IBA Guidelines also protect the parties’ interest in being fully informed of any facts or circumstances that may be relevant in their view, and set the time bar for raising objections in relation to conflicts of interest within a 30-day period. In an effort to balance the interests of a party to appoint the arbitrator of its choice, who may be a partner at a large law firm, and the importance of maintaining confidence in the impartiality and independence of international arbitrators, they provide the rule that the arbitrator must, in principle, be considered to bear the identity of his or her law firm, but further on clarify that the activities of the arbitrator’s firm should not automatically create a conflict of interest. Last but not least, the parties are required to disclose any relationship with the arbitrator to reduce the risk of an unmeritorious challenge of an arbitrator’s impartiality or independence based on information learned after the appointment.

Similarly, the Practice Note PN-01/17 (31.3.2017) adopted by SIAC providing guidance for arbitrators regarding disclosure in relation to cases involving external funding, should be seen as a blessing rather than a curse. At first glance it may be regarded by many as an additional restriction hindering rather than promoting the arbitration as a dispute resolution

---

<sup>101</sup> M.L. Smith, *Impartiality of the Party-Appointed Arbitrator*, *Arbitration* 1992, 58(1), 30-42, 41-42

mechanism. However, in world where transparency is a maxim, such guidelines help promote efficacy and fairness.

As a last comment, it is worth mentioning that due to the fact that challenge decisions by arbitral institutions are generally not reasoned, let alone published, it is not entirely clear what exact standards these institutions apply.<sup>102</sup> An indeed commendable exception to this rule is the LCIA, which in 2006 voted to publish abstracts of its reasoned decisions on challenges to arbitrators.<sup>103 104</sup>

---

<sup>102</sup> G. Nicholas, C. Partasides, *LCIA Court Decisions on Challenges to Arbitrators: A Proposal to Publish* (2007) 23 *Arbitration International* 7.

<sup>103</sup> These were published in 2011 in a special edition of Kluwer's *Arbitration International*: (2011) 27 *Arbitration International* 320.

<sup>104</sup> L.J.E. Timmer, *The Quality, Independence and Impartiality of the Arbitrator in International Commercial Arbitration*, *Arbitration* 2012, 78(4), 348-358, 354-356, 355.